STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: Michael Parrilla AAD No. 91-007/ISA
Application No. ISDS 9036-14

DECISION ON APPLICANT'S MOTION FOR SUMMARY JUDGMENT

This matter came before Hearing Officer McMahon for motion argument on August 19, 1992. Attorney Michael K. Marran represented the Division of Groundwater and ISDS ("Division") and counselors Charles S. Soloveitzik and Thomas J. Liguori, Jr. appeared on behalf of applicant. In furtherance of motion argument, the parties filed an Agreed Statement of Facts and memoranda of law in support of their respective positions.

Background

On September 27, 1987, application No. 87-36-137 (the "original permit") was approved by the ISDS Section with a notation that the construction of such a system first required approval of the Coastal Resources Management Council ("CRMC"). Applicant had already applied to the CRMC for a preliminary determination and subsequently filed a formal application for assent. In pursuit of the CRMC approval, applicant obtained a variance from the Westerly Zoning Board of Review and a water quality certificate from the Department of Environmental Management.

CRMC issued its assent on January 30, 1990. Shortly thereafter applicant filed a second ISDS application, No. 90-36-14, seeking to renew the previously granted permit which,

pursuant to Section SD 2.02(f) of the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems, effective 9/1/80 (sic, according to Agreed Statement of Facts, paragraph 5), hereinafter referred to as the "1980 ISDS Regs.", had expired on or about September 27, 1989.

In April 1990 the application was returned to applicant for corrections as well as with the notation that it must comply with the recently adopted Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Individual Sewage Disposal Systems, effective 1/3/90 ("1990 ISDS Regs."). The application was resubmitted to the ISDS Section on May 31, 1990 "with certain modifications per the prior review sheet" (Agreed Statement of Facts, paragraph 19), which sheet had been sent by ISDS with the returned application.

Several months later, applicant received a second ISDS review sheet containing comments from the Variance Board. The parties have stipulated that these recommendations were effected, including digging new test holes in preparation for filing for a variance (Agreed Statement of Facts, paragraphs 21 and 22).

Applicant was denied his variance in April 1991.

Argument

Applicant's Motion, Memorandum and oral argument asserts that he had a vested right to the permit granted in 1987 and thus the Department's requirement that he comply with the 1990 ISDS Regs. is a prohibited retroactive application of the 1990 regulations. He further submits that the Department should be estopped from denying renewal of the original permit because of its conduct in this matter.

DECISION AND ORDER

In some respects, the Agreed Statement of Facts raises more questions than it answers:

Applicant's original permit was for an ISDS for a three (3) bedroom dwelling but on March 2, 1990 filed a document in the Westerly Land Evidence Records restricting construction to a two-bedroom house; that on or about April 23, 1990, applicant's plans and attachments were "returned unacceptable" and contained the notation "Correct and resubmit"--the record doesn't reflect whether this indicated a problem with the original plans or was a matter of noncompliance with the 1990 ISDS Regs.; on or about October 24, 1990 the Variance Board made certain comments set forth in paragraph 20, but there is no indication of the substance of the request for variance therein referenced and how identical the plans would be to the original ones for which

approval had been obtained in 1987; applicant dug new test holes on December 6, 1990 but there's no indication whether the results were consistent with data set forth in the original application.

Section 8.00 of the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules") provides that parties in contested matters before the AAD may make such motions "which are permissible under these Rules and the R. I. Superior Court Civil Rules of Procedure (sic)" ("Court Rules"). Court Rule 56, which governs motions for summary judgment, provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

While applicant's motion asserts that he is entitled to judgment as a matter of law, his motion does not argue the absence of genuine issues of material fact which would entitle him to summary judgment. Palmisciano v. Burrillville Racing Ass'n., 603 A.2d 317, 320 (RI 1992). The Rhode Island Supreme Court has opined, however, that once a motion for summary judgment has been filed, the non-moving party has an affirmative

duty to set forth specific facts that show there is a genuine issue of material fact to be resolved at trial. Quimette v. Moran, 541 A.2d 855 (1988); Trend Precious Metals v. Sammartino, 577 A.2d 986 (RI 1990). See also David and Judy Kaloyanides, AAD No. 91-008/IE, Decision on Motions Presented by Department of Environmental Management, dated 3/16/92. The Division has not argued the existence of genuine issues of material fact, however; rather, it has asserted that "the facts have been stipulated; it is the legal consequence flowing from the facts which is at issue." Division's Memorandum, p. 2.

Accordingly, I will assume that the questions raised above are not matters in dispute between the parties.

The issue before me, therefore, is whether applicant must pursue his application under the 1980 ISDS Regs. or the 1990 ISDS Regs.

There is no doubt that applicant, in the time-consuming activity of pursuing the appropriate permits, became entangled in the change from the 1980 Regs. to the 1990 Regs. Applicant argues that he should be able to proceed under the 1980 ISDS Regs. which allowed for renewal of a permit under certain circumstances, which circumstances have been met.

I have reviewed the memoranda filed by the parties and the argument at motion hearing and, given the language of the 1980 ISDS Regs. section SD 2.02(f), I cannot accept applicant's

contention that once the ISDS permit was granted, he could compel its renewals as a vested right. Section SD 2.02(f) provided in pertinent part:

> Approval granted an applicant shall expire: 1. Within one year of the date of issuance if . . . and 2. within two years in all other cases if . . . In either case, approval may be renewed, if the plan has expired renewals will be acceptable, if the data provided in the application is unchanged and attested by the designer . . . (emphasis added).

Though the language and punctuation of the latter sentence fosters confusion, it is not sufficiently definite in its terms to furnish a basis for mandatory action by the Division.

The section states that the approval "shall expire" and "may be renewed" and essentially provides a shortcut to obtain the new permit: resubmit the previously approved plans and application with the attestation by its designer. While courts have sometimes construed "may" as directive, such an interpretation is achieved by studying the nature and intent of the statute; to construe "may" herein as compulsory rather than permissive would not be in accord with the nature and intent of the ISDS Regulations to protect the health, safety and welfare of the public. See Carlson v. McLyman, 74 A.2d 853, 77 RI 177 (1950); Nolan v. Rep. Council of City of Newport, 57 A.2d 730, 73 RI 489 (1948).

To find that applicant has a vested right into perpetuity to an ISDS permit would be contrary to the Division's and Department's obligations to protect the public interest, public health and environmental quality of the state and to its own actions herein: applicant was advised that he had to meet "all criteria of December, 1989 regulations (critical resource area)", was recommended that he obtain an agreement with an abutting property owner, and was required to file a deed restriction with the Recorder of Deeds. All of the above notifications were made following applicant's request for renewal and clearly indicate that the Division did not interpret section SD 2.02(f) of the 1980 ISDS Regs. as bestowing a vested right in applicant for automatic renewal of his permit notwithstanding any changes in environmental regulations. See ISDS Statement of Policy #1, dated June 21, 1991, p. 2. Using the rationale of the Rhode Island Supreme Court in Gryguc v. Bendick, 510 A.2d 937 (RI 1986), I accept the Division's interpretation of its own regulation herein.[1] See also Citizens

[1] I am concerned, however, about the role of the ISDS Statement of Policy #1. The clear language of SD 2.02(f) of the 1980 ISDS Regs. provided for permit renewal after expiration. The Policy for the new regulations fosters confusion by distinguishing between expired permits granted under the old regulations whose renewal is now governed by the new regulations, and existing permits granted pursuant to the old regulations which are eligible for a single year renewal so long as the plan complies with the old regulations. I observe no clear authority for this latter treatment in SD 2.03 of the 1990

Sav. Bank v. Bell, 605 F. Supp. 1033 (1985).

Having so found, I note therefore, that the issue of whether there was retroactive application of the 1990 ISDS Regs. is now moot.

Applicant has also argued that the initial permit was a conditional one and therefore the time did not begin to toll until the CRMC assent was obtained. I find however, that the notation on the plans to contact CRMC did not impose a condition but rather was done as a courtesy and reminder to applicant that his responsibility to comply with pertinent regulations did not end with obtaining the ISDS permit.

Further, Applicant's estoppel argument cannot be addressed by this tribunal though, as presented, he may have an argument to obtain Superior Court relief. But see Citizens Sav. Bank, 605 F. Supp. at 1044. We have consistently held that the DEM

ISDS Regs.. If the Policy were found to exceed the parameters of the 1990 ISDS Regs., it may be in violation of the rule-making requirements of the Administrative Procedures Act; but such a conclusion would still not benefit applicant: his expired permit would have to be renewed under the new regulations.

If the differing treatment of permits obtained under the 1980 ISDS Regs. is indeed supported by the new regulations, then applicant may have an equal protection argument. Again, this would not alter the outcome of my decision herein since the DEM Administrative Adjudication Division is without jurisdiction to consider any constitutional arguments which may arise. Richard and Anita Ally, AAD No. C-1915, Decision and Order dated 11/5/91; Stephen Fuoroli, AAD No. C90-0082, Decision and Order dated 4/20/92.

Administrative Hearing Officers have no statutory authority to provide or consider equitable or injunctive relief. John Huling, Sr., AAD No. C89-0168 (Respondent's Motion for Sanctions denied 3/23/92); John Travassos, AAD No. 91-020/FWA (Applicant's Motion to Compel denied 3/27/92).

Certainly the fact that applicant complied with all the recommendations of the ISDS Variance Board will be of import when applicant presents his case in chief, but it is not a matter properly before the Hearing Officer for estoppel.

Wherefore, after consideration of the above, it is hereby

ORDERED

1. Applicant's Motion for Summary Judgment is denied as a matter of law;

2. This matter will be rescheduled for hearing at the next available date. A new Notice of Administrative Hearing and Prehearing Conference and a Prehearing Order will issue to the parties shortly.

Entered as an Administrative Order this 30th day of November, 1992.

Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, RI 02908

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CERTIFICATION

I hereby certify that I caused a true copy of the within Decision on Applicant's Motion for Summary Judgment to be forwarded via regular mail, postage prepaid to Charles S. Soloveitzik, Esq., Two Elm Street, Westerly, RI 02891; Thomas J. Liguori, Jr., Esq., Urso, Liguori & Urso, 85 Beach Street, Westerly, RI 02891 and Michael K. Marran, Esq., Marran & Lessard, Two Charles Street, Providence, RI 02904-2269 on this 30th day of November, 1992.

Tracy Shields